

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

No. 80396-0

2007 NOV 30 P 4:13

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON
CLERK

FUTUREWISE, EVERGREEN ISLANDS, and SKAGIT AUDUBON
SOCIETY,

Respondents,

WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE
AND ECONOMIC DEVELOPMENT; and WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Intervenors

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD; and CITY OF ANACORTES,

Appellants,

WASHINGTON PUBLIC PORTS ASSOCIATION,

Intervenor.

STATE AGENCIES' STATEMENT OF SUPPLEMENTAL
AUTHORITY

ROBERT M. MCKENNA
Attorney General

Alan D. Copsey
WSBA No. 23305
Assistant Attorney General
Office of the Attorney General
PO Box 40109
Olympia, WA 98504-0109
360-586-6500

Thomas J. Young
WSBA No. 17366
Assistant Attorney General
Office of the Attorney General
PO Box 40117
Olympia, WA 98504-0117
360-586-4608

Questions in Oral Argument addressed a sentence in ESHB 1933,
Section 1(3) (Laws of 2003, ch. 321, § 1(3)):

The legislature further intends that the quality of information currently required by the shoreline management act to be applied to the protection of critical areas within shorelines of the state shall not be limited or changed by the provisions of the growth management act,

Relevant to this sentence, the State Agencies offer the following additional authorities:

1. **Senate Bill Report, ESHB 1933** (showing that the stakeholders who worked for the passage of ESHB 1933 understood and testified that the bill was a response to the Growth Management Hearings Board's *Everett* decision; that it was crafted by "a broad spectrum of interests" including "local government, the business community, and environmental groups"; the bill addresses the fact that "the GMA and SMA are not a total harmonious statutory scheme" and "is therefore only applicable after the new Department of Ecology guidelines kick in. The trigger for having separate jurisdictions is the new guidelines...").
2. **Final Bill Report, ESHB 1933** (addressing "Policy and Governance" on page 4 and "Best Available Science" on page 5, which is relevant to the language in the intent section referring to the quality of information "to be applied" under RCW 90.58.100 to

shoreline master program updates undertaken in the future, contrasting the bill's direction to use the SMA requirements when reviewing shoreline master program updates with the Growth Management Hearings Board's use of the GMA's best available science standard in the *Everett* decision).

3. **RCW 90.58.100(1)** (requiring "a systematic interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts" and other identified sources of information when adopting or updating master programs).

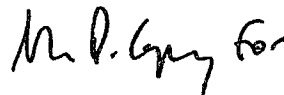
RESPECTFULLY SUBMITTED this 30th day of November,

2007.

ROBERT M. MCKENNA
Attorney General



Alan D. Copsey, WSBA No. 23305
Assistant Attorney General
Attorney for Washington State
Department of Community, Trade
and Economic Development



Thomas J. Young, WSBA No. 13766
Assistant Attorney General
Attorney for Washington State
Department of Ecology

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

PROOF OF SERVICE

2007 NOV 30 P 4: 13

BY RONALD R. CARPENTER

I certify that I served a copy of this document on all parties or their
counsel of record on the date below as follows: CLERK

US Mail Postage Prepaid via Consolidated Mail Service:

Eric Samuel Laschever
Steven J. Theile
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-3197

Melissa O'Loughlin White
Matthew Taylor
Cozen O'Connor
1201 3rd Ave., Suite 5200
Seattle, WA 98101-3071

Ian Stuart Munce
City Attorney
PO Box 547
Anacortes, WA 98221-0547

Keith Patrick Scully
Futurewise
814 2nd Ave., Suite 500
Seattle, WA 98104-1530

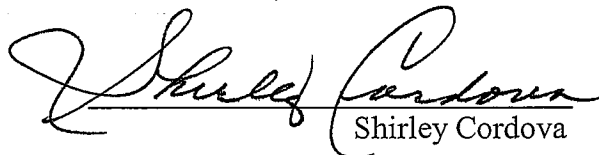
P. Stephen DiJulio
Susan Elizabeth Drummond
Foster Pepper PLLC
1111 3rd Ave., Suite 3400
Seattle, WA 98101-3229

Diane M. Kirchheim
Brian T. Hodges
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, WA 98004

Martha Lantz
Assistant Attorney General
Office of the Attorney General
Licensing & Admin. Law. Div.
PO Box 40110
Olympia, WA 98504-0110

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 30th day of November, 2007, at Olympia,
Washington.


Shirley Cordova

SENATE BILL REPORT

ESHB 1933

As Reported By Senate Committee On:
Land Use & Planning, April 3, 2003

Title: An act relating to the integration of shoreline management policies with the growth management act.

Brief Description: Declaring shoreline management act legislative intent.

Sponsors: House Committee on Local Government (originally sponsored by Representatives Berkey, Kessler, Cairnes, Buck, Sullivan, Orcutt, Hatfield, Jarrett, Miloscia, Gombosky, Grant, DeBolt, Quall, Woods, Schoesler, Conway, Lovick, Clibborn, Edwards, Schindler, McCoy, Eickmeyer and Alexander).

Brief History:

Committee Activity: Land Use & Planning: 3/31/03, 4/3/03 [DPA].

SENATE COMMITTEE ON LAND USE & PLANNING

Majority Report: Do pass as amended.

Signed by Senators Mulliken, Chair; Kline, McCaslin, Morton and T. Sheldon.

Staff: Jennifer Arnold (786-7471)

Background: In 1995, the Growth Management Act (GMA) was amended to require that the goals and policies of a shoreline master program under the Shoreline Management Act (SMA) be considered as an element of the local government's comprehensive plan. The other mandatory elements within a comprehensive plan include: land use, housing, a capital facilities plan, utilities, rural areas, transportation, economic development and parks and recreation.

GMA also sets forth 14 planning goals, although expressly not listed in order of priority within GMA, to guide the development of comprehensive plans and development regulations: urban growth, sprawl reduction, transportation, housing, economic development, property rights, permits, natural resource industries, open space and recreation, environment, air and water quality, citizen participation and coordination, public facilities and services, and the goals of SMA.

Recently, the Central Puget Sound Growth Management Hearings Board (CPSGMHB) in *Everett Shorelines Coalition v. City of Everett* interpreted the goals of GMA to require that the shoreline management element of a GMA comprehensive plan be given greater weight than the other elements in the comprehensive plan. The board further found that, under SMA, shoreline preservation, protection, enhancement and restoration are primary interests of the state, while development is not. In regards to critical areas, the board held that all "shorelines of statewide significance" are critical areas subject to both GMA and SMA.

There are concerns that, in the absence of any shoreline guidelines to interpret SMA, the board's findings were flawed; shoreline management policy has traditionally provided that the state's interest is broader than solely environmental concerns. Further, there are additional concerns that the goals and policies of SMA should not be required to take priority over all of the other goals of GMA, having the effect of limiting the discretion of local governments to determine the priorities of their particular community. And finally, there is concern that the board's implication that the best available science cannot exist without the consensus support of qualified reviewers is incorrect and inconsistent with state statutes.

Summary of Amended Bill: It is clarified that legislative intent is for all 14 goals, as well as the policies, of GMA to continue to be listed without an order of priority. The goals and policies of SMA are to be interpreted and applied consistent with the Shoreline Hearings Board and court decisions that were made prior to the CPSGMHB decision.

Shorelines of statewide significance are not deemed to be critical areas solely because they have been designated "shorelines of statewide significance."

Local governments may include buffer land for critical areas in their shoreline master programs under the SMA, but if such lands are not included in the master program, the local government must include these lands in its critical area ordinances under the GMA. In regards to critical area buffers, it is clarified that this legislation is not intended to apply any additional regulations under the SMA upon forest practices that are regulated under the Forest Practices Act. It is further clarified that nothing in this bill is intended to affect whether or to what extent the definition under current law for agricultural activities in RCW 90.58.065 is subject to the GMA.

GMA provisions for best available science do not apply to shoreline master programs; instead, SMA and the applicable shoreline guidelines govern. It is expressly provided that this provision is not intended to reduce the quality of information used in protecting critical areas.

Growth management hearings boards (GMHBs) may review shoreline master programs only for compliance with SMA and applicable shorelines guidelines. GMHB review of a local master program for GMA compliance is restricted to specific GMA internal consistency statutes.

Amended Bill Compared to Substitute Bill: All reference to the new proposed guidelines by the Department of Ecology is removed and instead reference is made to "applicable" guidelines. It is clarified that forest practices regulated under the Forest Practices Act are not subject to additional regulations under the SMA as a result of this bill. It is further clarified that the bill is not intended to affect the treatment of agricultural activities under the GMA. The definition of shorelands in the SMA is changed and a new section is added to the GMA, which provides that if a local government does not include lands necessary for critical area buffers in its shoreline master program, then such lands must be included within the local governments' critical area ordinance under the GMA.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill is in response to a GMHB decision regarding the City of Everett, although the importance of the bill transcends the board decision. The primary purpose of the bill is to clarify legislative intent in three major areas: (1) clarify that there is no order of priority among the goals and policies of the GMA; (2) establish a bright line for critical area jurisdiction between the GMA and the SMA; and (3) clarify the role of the Department of Ecology in approving master programs under the SMA. This legislation is a solution created by a broad spectrum of interests: local government, the business community, and environmental groups. The stakeholders in the board decision came to the Legislature with this bill in order to address a few of the issues raised in that decision, in particular, that the GMA and SMA are not a total harmonious statutory scheme. The Everett decision was rendered in the absence of any shoreline guidelines. This bill addresses that issue and is therefore only applicable after the new Department of Ecology guidelines kick in. The trigger for having separate jurisdictions is the new guidelines, but this bill does not address what the content of those new guidelines should be. This bill will also take into consideration the difference in development needs in urban areas versus rural areas. The bottom line is that it is the Legislature's job to decide if the SMA should be integrated into the GMA or not. This bill does not solve all the problems, but goes a long way to sort out the parts that GMA and SMA play and to make sure that they work together better. In addition, this legislation is needed in order to ease the current tensions and allow jurisdictions that want to update their master programs to move forward.

Testimony Against: None.

Testified: Rep. Jean Berkey, prime sponsor; Dick McCann, AWB (pro); Gordon White, Ecology (pro); Heather Ballash, CTED (pro); Chris Towne, City of Everett (pro); Dave Williams, AWC (pro); Eric Johnson, WPPA (pro); Kristen Sawin, AWB (pro).

FINAL BILL REPORT

ESHB 1933

C 321 L 03

Synopsis as Enacted

Brief Description: Declaring shoreline management act legislative intent.

Sponsors: By House Committee on Local Government (originally sponsored by Representatives Berkey, Kessler, Cairnes, Buck, Sullivan, Orcutt, Hatfield, Jarrett, Miloscia, Gombosky, Grant, DeBolt, Quall, Woods, Schoesler, Conway, Lovick, Clibborn, Edwards, Schindler, McCoy, Eickmeyer and Alexander).

House Committee on Local Government
Senate Committee on Land Use & Planning

Background:

I. SHORELINE MANAGEMENT ACT

Policy. The Shoreline Management Act (SMA) governs uses of state shorelines. The SMA enunciates state policy to provide for shoreline management by planning for and fostering "all reasonable and appropriate uses." The SMA prioritizes public shoreline access and creates preference criteria listed in the following order of priority that must be used by state and local governments in regulating shoreline uses:

- recognizing statewide interest over local interest;
- preserving natural shoreline character;
- resulting in long-term over short-term benefit;
- protecting shoreline resources and ecology;
- increasing public access to publicly owned shoreline areas;
- increasing public recreational opportunities; and
- providing for any of the mandatory elements within the local shoreline master program.

The SMA governs "shorelines of the state." These "shorelines of the state" are defined in the SMA to include both "shorelines" and "shorelines of statewide significance" as defined by statute.

"Shorelands" include the lands extending landward for 200 feet in all directions from the ordinary high water mark as well as floodways and contiguous floodplain areas landward 200 feet from the floodways. "Shorelands" also include all wetlands and river deltas associated with streams, lakes, and tidal waters subject to the SMA.

Requirements. The SMA involves a cooperative regulatory approach between local governments and the state. At the local level, SMA regulations are developed in local shoreline master programs (master programs). All counties and cities with shorelines of the state are required to adopt master programs which regulate land use activities in shoreline areas of the state. Counties and cities are also required to enforce their master programs within their jurisdictions. All 39 counties and more than 200 cities have enacted shoreline master programs.

Master Programs. Master programs regulate land use and activities within the shoreline jurisdiction. Local master programs have certain mandatory elements as appropriate. These include:

- an economic development element for locating and designing water-dependent industrial projects and other commercial activities;
- a public access element to provide for public access to public areas;
- a recreational element to preserve and enhance shoreline recreational opportunities;
- a circulation element to locate transportation and other public facilities for shoreline use;
- a use element addressing the location and extent of shoreline use for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public facilities, and other uses;
- a conservation element to preserve natural resources in shoreline areas;
- a historic, cultural, scientific, and educational element to protect buildings, sites, and areas with such values; and
- an element considering statewide interests in preventing and minimizing flood damage.

Local governments may include other elements necessary to implement the SMA requirements.

Appeals. Appeals of shoreline rules adopted by the Department of Ecology (DOE) and other specific matters are reviewed by the Shorelines Hearings Board (SHB).

For jurisdictions planning under the major Growth Management Act requirements, adoption or amendment of master programs are appealed to the Growth Management Hearings Board (GMHB). Master programs adopted by other jurisdictions are appealed to the SHB. Certain standards are specified for appellate review of master programs. Decisions of either the SHB or the GMHB may be appealed to superior court.

II. GROWTH MANAGEMENT ACT

Policy. The Growth Management Act (GMA) establishes a comprehensive land use planning framework for county and city governments in Washington. Counties and cities

meeting specific population and growth criteria are required to comply with the major requirements of the GMA. Counties not meeting these criteria may choose to plan under the GMA. Twenty-nine of 39 counties, and the cities within those 29 counties, are required to or have chosen to comply with the major requirements of the GMA (GMA jurisdictions).

The GMA establishes a list of 13 planning goals to be used exclusively for guiding the development and adoption of comprehensive land use plans and development regulations by GMA jurisdictions. The goals, which are not listed in an order of priority, include:

- encouraging urban growth in urban areas with adequate public facilities;
- reducing low-density development sprawl;
- encouraging efficient, regionally coordinated transportation systems;
- encouraging affordable housing availability;
- encouraging economic development and growth in areas with insufficient growth;
- protecting private property rights;
- processing permits in a timely and fair manner;
- maintaining and enhancing natural resource industries;
- retaining and developing open space and recreation availability and opportunities;
- protecting the environment and water availability;
- encouraging citizen participation and coordination;
- ensuring adequate public facilities and services; and
- encouraging historic preservation.

Requirements - Comprehensive Land Use Plans/Critical Areas. Among numerous planning requirements, GMA jurisdictions must adopt internally consistent comprehensive land use plans (comprehensive plans), which are generalized, coordinated land use policy statements of the governing body. Each comprehensive plan must include planning provisions for each of the following elements:

- land use;
- housing;
- capital facilities plan;
- utilities;
- rural;
- transportation;
- economic development; and
- park and recreation.

The economic development and park and recreation elements do not require jurisdictional compliance or action until state funding is provided.

The GMA also requires all local governments to comply with specific provisions for critical areas. "Critical areas" are defined to include: wetlands; areas with a critical

recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; frequently flooded areas; and geologically hazardous areas. Using the best available science, each county and city must designate and protect critical areas. The protection of designated critical areas occurs through mandatory development regulations (i.e., critical area ordinances) adopted at the local level.

Comprehensive plans and development regulations are subject to continuing review and evaluation by the adopting county or city. Any amendments or revisions of development regulations must comply with the requirements of the GMA and must be consistent with and implement comprehensive plans.

III. POLICY INTEGRATION

In 1995 the Legislature enacted environmental regulatory reform legislation that implemented recommendations of the Governor's Task Force on Regulatory Reform. The legislation added the goals and policies of the SMA as an additional goal to the 13 planning goals of the GMA. Furthermore, the goals and policies of a master program required by the SMA were deemed an element of a GMA jurisdiction's comprehensive plan.

Summary:

GMA PROVISIONS

Policy and Governance. The GMA is amended to specify new policy and governance provisions for shorelines of the state, including establishing that:

- the integration of SMA goals and policies into the planning goals of the GMA does not create an order of priority among the GMA planning goals;
- master programs may not be adopted pursuant to goals, policies, and other existing GMA criteria used for the adoption of comprehensive plans or development regulations; and
- SMA policies, goals, provisions, and applicable guidelines must, with limited exceptions, be the sole basis for determining compliance of a master program with the GMA.

Critical Areas - Jurisdictional Provisions. "Shorelines of the state" must not be considered critical areas under the GMA except to the extent that specific areas within shorelines of the state qualify for designation and have been designated as such by a local government.

As of the date the DOE approves a master program adopted under applicable shoreline guidelines, the protection of critical areas within shorelines of the state must be accomplished through a master program. Master programs must provide a level of

protection to critical areas within shorelines of the state that is at least equal to that provided by specific development regulations (such as critical area ordinances) required by the GMA. Except as provided, these critical areas are not subject to the procedural and substantive requirements of the GMA. If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, the local jurisdiction must continue to regulate those critical areas and the required buffers according to critical area ordinances.

Best Available Science. The GMA requirement for using the best available science when designating and protecting critical areas may not apply to the adoption or amendment of master programs and may not be used to determine compliance of a master program with the SMA and applicable guidelines.

SMA PROVISIONS

Definitions and Concepts - Shorelands. The SMA definition of "shorelands" allows a local jurisdiction to include within its master program buffers for critical areas that occur within shorelines of the state. Forest practices, other than conversions to nonforest land use, within these buffer areas are not subject to additional regulations under the SMA.

Master Program Approval. The DOE must approve the segment of a master program relating to critical areas if the segment is consistent with the policy of the SMA and applicable guidelines, and if the segment provides a level of protection of critical areas at least equal to that provided by critical area ordinances.

Master Program Appeals - Growth Management Hearings Boards. Growth Management Hearings Boards (GMHBs) may review appeals of proposed master programs or amendments for compliance with specific internal consistency provisions of the GMA. GMHBs may also review appeals of proposed master programs or amendments for compliance with consistency provisions required for city and county development regulations.

Votes on Final Passage:

House 66 31
Senate 45 0 (Senate amended)
House 98 0 (House concurred)

Effective: July 27, 2003

RCW 90.58.100 Programs as constituting use regulations — Duties when preparing programs and amendments thereto — Program contents.

(1) The master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

...